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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ALAN BRINKER, AUSTIN RUGG, and ANA SANDERS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

NORMANDIN'S, a California corporation, d/b/a NORMANDIN CHRYSLER JEEP DODGE RAM, and ONECOMMAND, INC.,

Defendants.

NO. 5:14-cv-03007-EJD-HRL

PLAINTIFF'S NOTICE OF MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION

HON. EDWARD J. DAVILA

Complaint Filed: July 1, 2014

DATE: April 27, 2017
TIME: 9:00 a.m.
LOCATION: Courtroom 4 – 5th Floor

TO: DEFENDANTS NORMANDIN'S, a California corporation, d/b/a NORMANDIN CHRYSLER JEEP DODGE RAM, and ONECOMMAND, INC., AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 27, 2017, at 9:00 a.m., in Courtroom 4, 5th Floor, of the U.S. District Court for the Northern District of California, 280 South 1st Street, San Jose, California, 95113, Plaintiff will move for reconsideration of the Court's order dismissing their claims under the Telephone Consumer Protection Act. This motion will be made on the grounds that questions of law and fact common to the class predominate over any questions affecting individual members.

The motion will be based on: this Notice of Motion and the following Memorandum of Points and Authorities; the records and file in this action; and on such other matters as may be presented before or at the hearing of the motion.

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I. INTRODUCTION

Plaintiffs respectfully request reconsideration of the Court's order dismissing their claims under the Telephone Consumer Protection Act ("TCPA") (Dkt. No. 141). Under controlling Ninth Circuit authority, a "plaintiff alleging a violation under the TCPA 'need not allege any *additional* harm beyond the one Congress has identified' " to establish Article III standing." *Van Patten v. Vertical Fitness Grp.*, No. 14-55980, 2017 WL 460663, at *4, --- F.3d ---- (9th Cir. 2017). Under *Van Patten*, which was decided on January 30, 2017—after Plaintiffs filed their opposition to the motion to dismiss (Dkt. No. 132)—Defendants' calls to Plaintiffs are harms sufficient to confer Article III standing.

II. STATEMENT OF FACTS

In their Second Amended Complaint, Plaintiffs alleged they received prerecorded telemarking calls from Defendants that violated their privacy, and were annoying and harassing (Dkt. No. 127). On September 9, 2016, Defendant OneCommand moved to dismiss under *Spokeo v. Robins*, arguing that calls Plaintiffs received did not confer Article III standing (Dkt. No. 130). On the same day, Defendant Normandin's filed a joinder to OneCommand's motion (Dkt. No. 131). Plaintiffs timely opposed the motion on September 22, 2016 (Dkt. No. 132). OneCommand timely filed its reply on September 30, 2016 (Dkt. No. 134).

On January 30, 2017, the Ninth Circuit issued its decision in *Van Patten v. Vertical Fitness Group*, where it held: a "plaintiff alleging a violation under the TCPA 'need not allege any *additional* harm beyond the one Congress has identified' " to establish Article III standing." *Van Patten*, 2017 WL 460663, at *4 (citing *Spokeo*, 136 S.Ct. at 1550) (emphasis in original)). Plaintiffs intended to inform the Court of *Van Patten* at a hearing on Defendants' motion, scheduled for February 23, 2017.

On February 17, 2017, the Court held that the injuries Plaintiffs incurred from Defendants' prerecorded calls were "nominal" and "too minimal to establish standing." (Dkt.

No. 141). Based on this determination, the Court granted OneCommand's motion to dismiss without leave to amend. *Id.*

III. ISSUE STATEMENT

Whether the Court should reconsider its order granting Defendants' motion to dismiss for lack of standing based on the Ninth Circuit's January 30, 2017 decision in *Van Patten v. Vertical Fitness Group*, No. 14-55980, 2017 WL 460663, --- F.3d ---- (9th Cir. 2017).

IV. AUTHORITY AND ARGUMENT

Rule 59(e) of the Federal Rules of Civil Procedure is the "proper vehicle" for filing a motion for reconsideration of a motion to dismiss without leave to amend. *See Mir v. Fosburg*, 646 F.2d 342, 344 (9th Cir. 1980). A Rule 59(e) motion may be granted if "justified by an intervening change in controlling law." *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011).

On January 30, 2017, the Ninth Circuit delivered its opinion in *Van Patten v. Vertical Fitness Group*. There, the plaintiff alleged that he received two text messages in violation of the TCPA. *Van Patten*, 2017 WL 460663, at *2. The defendant, Vertical Fitness Group, made the same argument OneCommand made here—that the plaintiff did not establish a concrete injury-in-fact necessary to pursue his TCPA claim in light of *Spokeo*. *Id.* at *4.

The Ninth Circuit rejected the argument. Looking first to the issue of Congressional intent, the Ninth Circuit found that, in passing the TCPA, "Congress sought to protect consumers from the unwanted intrusion and nuisance of unsolicited telemarketing phone calls and fax advertisements," and therefore purposefully "establishe[d] the substantive right to be free from certain types of phone calls and texts absent consumer consent." *Van Patten*, 2017 WL 460663, at *4. The Ninth Circuit gave express deference to Congress's decision to identify the intangible harm of unsolicited contact as a *concrete harm* that meets minimum Article III requirements. *Id.* (emphasis added).

The Ninth Circuit further noted: "[u]nlike in *Spokeo*, where a violation of procedural requirement minimizing reporting inaccuracy may not cause actual harm," nonconsensual telemarketing messages "present the precise harm and infringe the same privacy interests Congress sought to protect in enacting the TCPA." *Van Patten*, 2017 WL 460663, at *4. Thus, the Ninth Circuit held that because "[u]nsolicited telemarketing phone calls or text messages, by their nature, invade the privacy and disturb the solitude of their recipients," a "plaintiff alleging a violation under the TCPA 'need not allege any *additional* harm beyond the one Congress has identified' " to establish Article III standing. *Id*. (citing *Spokeo*, 136 S.Ct. at 1550 (emphasis in original)).

Therefore, in alleging that he received unwanted texts, Van Patten alleged a concrete injury that was sufficient to confer Article III standing. *Van Patten*, 2017 WL 460663, at *5. Likewise, here, in alleging they received unwanted calls from Defendants, Plaintiffs have established the injury-in-fact required to pursue their TCPA claims.

Van Patten was decided after the parties completed their briefing, and therefore was not addressed by the parties. Because *Van Patten* is controlling, Plaintiffs urge the Court to reverse its order granting OneCommand's motion. *See also Figy v. Amy's Kitchen, Inc*, No. C 13-03816-SI, 2014 WL 3362178, at *4 (N.D. Cal. July 7, 2014) (granting in part motion for reconsideration based on controlling Ninth Circuit authority); *Swearingen v. Santa Cruz Nat. Inc*, No. C 13-04291 SI, 2014 WL 2967585, at *4 (N.D. Cal. July 1, 2014) (same).

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for reconsideration.

RESPECTFULLY SUBMITTED AND DATED this 3rd day of March, 2017.

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CERTIFICATE OF SERVICE

I, Beth E. Terrell, hereby certify that on March 3, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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